

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

**WASHINGTON HARBOUR, SUITE 400**

**3050 K STREET, NW**

**WASHINGTON, D.C. 20007-5108**

NEW YORK, NY

CHICAGO, IL

STAMFORD, CT

PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES

MUMBAI, INDIA

FACSIMILE

(202) 342-8451

www.kelleydrye.com

(202) 342-8400

DIRECT LINE: (202) 342-8602

EMAIL: tdaubert@kelleydrye.com

October 27, 2008

**VIA ECFS**

Chairman Kevin J. Martin  
Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *High-Cost Universal Service Support; Federal-State Joint Board on  
Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45

Dear Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell:

International Telecom, Ltd. ("ITL"), by its attorneys, urges the Federal Communications Commission ("Commission") to seek public comment on the details of the proposed reform of the universal service contribution mechanism rather than adopt reform on November 4. Important questions regarding reform of the contribution mechanism cannot be answered based on the current record, particularly to the extent the Commission intends to rely in part upon telephone numbers to trigger a contribution obligation. Among other things, the Commission needs meaningful comment from the public regarding:

- the scope and operation of *mandatory exemptions* necessary to reflect the Commission's lack of authority to require contributions for all services that use telephone numbers;
- whether the public interest would be served by adopting *permissive exemptions* as requested by various parties, and if so, the scope and operation of those exemptions; and

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- how to minimize the costs and burdens associated with implementing the proposed contribution reforms, and whether those burdens outweigh the resulting benefits.

Therefore, the current revenues-based system should be maintained until the public has the opportunity to provide the Commission with meaningful feedback, allowing the Commission to adopt reform based upon a complete record.

### **Mandatory Exemptions Are Necessary To Reflect Limits on the Commission's Authority**

The Commission lacks the authority to require contributions to the federal universal service fund based solely upon usage of a NANP telephone number or the equivalent. As such, any contribution mechanism that relies in part or in whole upon telephone numbers must include mandatory exemptions to reflect the limits on the Commission's authority. For example, the Commission must create exemptions for telephone numbers used to provide (1) non-telecommunication services; (2) intrastate telecommunications services; and (3) international telecommunications services. Failure to consider these serious limitations upon the Commission's authority could lead to protracted legal challenges that would interfere with the goals of the universal service program.

#### ***Exemption for Non-Telecommunication Services***

Under the Act, the Commission has the authority to require contributions from providers of "interstate telecommunications services."<sup>1</sup> The Commission may also require "[a]ny other provider of interstate telecommunications" to contribute to universal service, but only to the extent that the "public interest *so requires*."<sup>2</sup> In order to require contributions from these "other providers of interstate telecommunications," the Commission must make a three part finding that:

- the "provider furnishes or supplies components of a service";
- the provider provides "telecommunications" that are interstate in nature; and

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<sup>1</sup> 47 U.S.C. § 254(d).

<sup>2</sup> *Id.* (emphasis added); *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7538 (2006) (*Interconnected VoIP USF Order*).

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- the public interest **requires** contributions by these providers to the federal universal service fund.<sup>3</sup>

To date, the Commission has exercised this “permissive authority” to require contributions from private carriers, payphone aggregators, and providers of interconnected VoIP services because “the public interest so requires.”<sup>4</sup>

Telephone numbers, however, are used by many “other providers of telecommunications” to which the Commission has never applied the three part “permissive authority” test. For example, telephone numbers are used, among other things, for PSTN to PC one-way VoIP services and one-way voice to e-mail applications. As such, the Commission cannot impose a mandatory contribution requirement based solely upon the fact that a telephone number is being used; exemptions must be provided for telephone numbers used by “other providers of telecommunications” with respect to which the Commission has yet to exercise its permissive authority under section 254.

The Commission cannot avoid this issue by making a blanket finding that the public interest “requires” contributions whenever a telephone number is used. Rather, the test requires analysis of the three parts described above. In particular, the Commission can only determine whether a service provider “furnish[es] or suppl[ies] components of a service” or provides “telecommunications” that are interstate in nature on a service-by-service or application-by-application basis. Further, without performing such individual analyses, the Commission cannot reasonably determine whether the public interest **requires** contributions by these service or application providers to the federal universal service fund.<sup>5</sup>

Ultimately, the Commission may need to adopt contribution exemptions for all non-“telecommunications services” for which the Commission does not explicitly find the Fund contribution is required. Accordingly, the Commission should not adopt a numbers-based contribution mechanism (hybrid or otherwise) until it requests comment upon, among other things, which services can be required to contribute and whether a numbers-based contribution scheme that is consistent with the limits of the Commission’s authority would serve the public interest.

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<sup>3</sup> *Id.* at 7538-40.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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### *Exemption for International Services*

The Commission also lacks authority to impose contribution requirements upon international traffic. In the *First Report & Order*, the Commission found that carriers that provide only international telecommunications services are not “telecommunications carriers that provide interstate telecommunications services,” and, therefore, are exempt from mandatory universal service contribution obligations.<sup>6</sup> One example of such services is international “call-back” services.<sup>7</sup> These services make use of U.S. telephone numbers, but provide purely international services when used to connect calls between end-users not located in the United States.<sup>8</sup> These services lack the interstate element necessary to allow the Commission to include them in assessing universal service contributions. As such, numbers associated with this and other international services should not be assessable, and the Commission must include an exemption for such numbers in any numbers-based contribution mechanism it adopts.

### *Exemption for Intrastate Services*

Section 152(b) of the Act denies the Commission “jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communications service.”<sup>9</sup> The only means for overcoming the “statutory presumption” that the Commission lacks authority over intrastate issues is for the agency to point to “unambiguous language showing that the statute [at issue] applies to intrastate matters.”<sup>10</sup>

Neither the universal service provisions of the Act nor the provisions of the Act governing the North America Number Plan contain unambiguous language granting the Commission authority to assess contributions for the federal universal service fund based merely

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<sup>6</sup> *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 779 (1997).

<sup>7</sup> *See, e.g., Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-Back Service*, Order, 18 FCC Rcd 6077 (2003) (declining to enforce foreign restrictions on international call-back services).

<sup>8</sup> *Id.*

<sup>9</sup> 47 U.S.C. § 152(b) (emphasis added).

<sup>10</sup> *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 447-48 (5th Cir. 1999) (citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 380-81 (1999)) (*TOPUC*). The courts have rejected claims that rely upon the Commission’s plenary powers or upon statutes that fail to explicitly authorize intrastate action by the Commission. *TOPUC*, 183 F.3d at 447-48; *Qwest v. FCC*, 258 F.3d 1191, 1203 (10th Cir. 2001); *Vonage v. FCC*, 489 F.3d 1232, 1236 (D.C. Cir. 2007).

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upon use of a telephone number.<sup>11</sup> To the contrary, the universal service provisions of the Act make clear that the Commission's authority only extends to interstate providers of telecommunications services.<sup>12</sup> The same is true with respect to the numbering provisions of the Act, which provide the Commission with jurisdiction only to administer the numbering plan itself and to recover costs associated with "administration arrangements."<sup>13</sup> In the absence of clear and unambiguous language granting the Commission authority over intrastate services, the Commission cannot mandate contributions to the federal universal service fund for telephone numbers used to provide only intrastate services.<sup>14</sup>

Telephone numbers frequently are used to provide purely intrastate services.<sup>15</sup> For example, service providers (or end users themselves) can configure services such that only intrastate calls can be made to, or from, the service with which a specific telephone number is associated. For example, ITL itself provides services that do not permit interstate traffic to be originated by, or terminated to, their telephone numbers, including free voicemail offerings and intrastate local and toll-free services.<sup>16</sup> Similarly, some customers use telephone numbers associated with purely intrastate services to track the effectiveness of local advertising.<sup>17</sup>

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<sup>11</sup> 47 U.S.C. § 254 (governing universal service); 47 U.S.C. § 251(e) (governing the establishment of the North American Numbering Administration); *Interconnected VoIP USF Order*, 21 FCC Red. at 7539.

<sup>12</sup> See *Qwest v. FCC*, 258 F.3d 1191, 1203 (10<sup>th</sup> Cir. 2001) (holding that "the FCC may not consider intrastate revenues in assessing a carrier's contribution to the federal universal-service support mechanism.") (internal citations omitted).

<sup>13</sup> 47 U.S.C. § 251(e).

<sup>14</sup> See Ex Parte Letter from Todd D. Daubert, Counsel for NuVox, to Chairman Kevin J. Martin, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, at 4-6 (filed Oct. 8, 2008) (*NuVox Ex Parte Letter*); Comments of Verizon Wireless, *Federal State Joint Board on Universal Service*; CC Docket No. 96-45, CC Docket No. 98-171, CC Docket No. 90-571, CC Docket No. 92-237, NSD File No. L-00-72, CC Docket No. 99-200, CC Docket No. 95-116, CC Docket No. 98-170, 7-8 (filed Apr. 22, 2002) (*Verizon Comments*).

<sup>15</sup> See, e.g., *NuVox Ex Parte Letter* at 4-6. ITL itself makes use of purely intrastate services as part of its free voicemail offerings and its Kall8 (toll free and local inbound services). Indeed, many of ITL's Kall8 customers request arrangements that prevent any type of interstate traffic from being initiated or terminated to their numbers.

<sup>16</sup> These telephone numbers are not associated with subscriber lines.

<sup>17</sup> The numbers are listed in specific advertisements (e.g., a billboard, newspaper or phone book), and calls to those numbers are routed to the "permanent" numbers of the advertising party. Calls are never originated from the numbers, customers have the ability to block interstate calls, and many advertisements are local such that they do not typically generate interstate traffic.

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Even if a service is capable of placing or receiving interstate calls, it may not actually be used to place or receive interstate calls. For example, services used by consumers who do not place interstate long-distance calls (or even block their ability to do so) and whose friends and family all live within the same state may in fact be purely intrastate despite the theoretical ability to receive an interstate call. With respect to numbers associated with services that are both inter- and intrastate in nature, proposals to impose a contribution requirement that do not track the inter- and intrastate mix of services associated with that number arguably violate section 152(b).<sup>18</sup> Any proposal that assesses numbers without regard, or with only minimal regard, for the jurisdictional mix of services associated with those numbers (which includes the proposal submitted by AT&T and Verizon) arguably violates section 152(b) and the Fifth Circuit's holding in *TOPUC* because such an assessment would invariably affect intrastate service providers decisions on whether and how to provide intrastate services.<sup>19</sup>

#### *Permissive "Public Interest" Exemptions*

In addition to the several statutory-mandated exemptions identified above (e.g., intrastate exemptions, non-"telecommunications services" exemptions, international services exemptions), numerous parties have requested additional exemptions from the numbers-based contribution obligation.<sup>20</sup> For example, some parties are requesting exemptions for services for which subscribers pay no fees, because the fees are instead paid by advertisers or other third parties.<sup>21</sup> To the extent these services are exempted, ITL respectfully submits that functionally identical services should be exempted even if the subscriber chooses to pay the fees for those services directly, because the source of revenue for a service should be irrelevant for universal service purposes. In any event, without more information regarding the details of the hybrid

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<sup>18</sup> *NuVox Ex Parte Letter* at 5; *Verizon Comments* at 8 (arguing that "any flat rate would represent an impermissible assessment on intrastate revenues" because the proposed mechanism "would improperly assess contributions on all ... phone connections, whether or not they generate interstate revenue.")

<sup>19</sup> *Verizon Comments* at 7; *TOPUC*, 183 F.3d at 447, n. 101.

<sup>20</sup> AT&T/Verizon Notice of Ex Parte Communication, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45 (filed Sep. 30, 2008) (proposing exemptions for subscribers purchasing additional numbers on family plans); Google Notice of Ex Parte Communication, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, at 1-2 (filed Oct. 3, 2008) (proposing exemptions for service providers offering free services) (*Google Ex Parte*); TracFone Notice of Ex Parte Communication, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, at 4-6 (filed Sep. 17, 2008) (proposing exemptions for subscribers purchasing additional numbers on family plans).

<sup>21</sup> *Google Ex Parte* at 1.

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mechanism the Commission is considering, it is impossible for parties to provide meaningful comment regarding the permissive exemptions parties have requested.

**The Record Regarding Numbers-Based Mechanisms Remains Incomplete**

The Commission should consider whether to adopt sweeping reform of the universal service contribution mechanism only after all parties have had the opportunity to review and comment upon the specific details of the proposed reform, including the issues raised above. The FCC is under no deadline to reform the universal service contribution mechanism, and thus there is no reason adopt an order before the public has had a meaningful opportunity to comment on the details of the proposed rules.

Rushing reform without giving the public an opportunity to provide meaningful feedback on the details of the reform would harm the public interest by increasing the chances of litigation and avoidable problems created by flawed rules and policies.<sup>22</sup> For example, the record before the Commission regarding potential arbitrage opportunities created by a pure numbers-based or numbers/revenues hybrid contribution mechanism is inadequate. Any new proposal will likely result in sophisticated users of telecommunications services adapting their telecommunications systems so as to minimize their required contributions.<sup>23</sup> Without comment on the exact rules the Commission intends to adopt, it will be impossible to predict the potential arbitrage strategies, or the extent to which parties could engage in those particular arbitrage strategies. This could result in volatile and unforeseen swings in USF funding as subscribers engage in arbitrage that the FCC may not have predicted, which ultimately will harm the public, particularly residential subscribers who may not be as able to engage in strategies to reduce their contributions.

Without the benefit of analysis and feedback from the public, the Commission will not be in a position to determine whether their proposed rules are feasible and, if so, whether the costs associated with implementing and complying with the rules would be unjustifiably costly and burdensome. Indeed, any hybrid or pure-numbers-based mechanism that contains exemptions and exceptions to reflect the limitations upon the Commission's authority likely would be so complicated that the justification for reform would be negated entirely. Therefore, the Commission should publish the details of any proposed contribution mechanism and seek meaningful feedback before proceeding with any reform. Feedback from the parties who will

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<sup>22</sup> The full notice and comment requirement is the keystone of the Administrative Procedures Act. 5 U.S.C. § 500 *et seq.*

<sup>23</sup> For instance, many companies that require a significant number of extensions will move to an internal routing system or PBX.

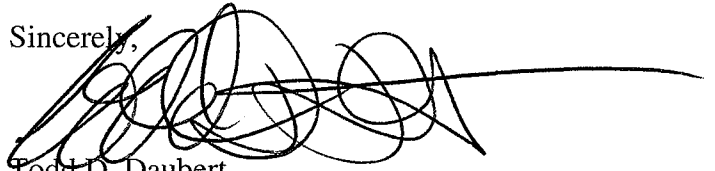
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have to modify their billing, reporting, and accounting systems to comply with new rules is essential to ensuring the efficiency of the new system.

**Conclusion**

For the reasons set forth in this letter, International Telecom, Ltd. urges the Commission to maintain the current revenues-based system until the Commission can fully address the limitations associated with a numbers-based mechanism, hybrid or otherwise, and publish proposed rules for the public to review.

Sincerely,

A handwritten signature in black ink, appearing to read 'Todd D. Daubert', with a long horizontal line extending to the right.

Todd D. Daubert

*Counsel to International Telecom, Ltd.*